2002

The State of Utah v. Gerald W. Deitman and Albert D. Lozano : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	20584
GERALD W. DEITMAN and ALBERT D. LOZANO,	:	Case No. 20584 Category No. 2
Defendants/Appellants	:	

BRIEF OF APPELLANTS

Appeal from a conviction and judgment of burglary, a felony of the third degree and theft, a felony in the second degree, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment against Gerald W. Deitman and Albert Delphine Lozano for one count of burglary, a third degree felony, in violation of Utah Code Ann §76-6-202 (1953 as amended) (Addendum A), and one count of theft, a second degree felony in violation of Utah Code Ann. §76-6-412 (Addendum B). The trial judge found both Defendants guilty following a trial on February 4, 1985, in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding. The Defendants were both sentenced to incarceration for a term of 0-5 years, but the sentences were stayed and both Defendants were placed on 18-months probation and fined (R. 69,76).

STATEMENT OF FACTS

In the early morning hours of March 1, 1984, officers were alerted to a possible burglary at International Video, 40 East 1300 South in Salt Lake City (T. 37-38). When Salt Lake City Police Officers Morgan Sayes and Ken Schoney arrived at the scene, they noticed a white pickup truck which was parked across the street from International Video. As the officers approached the video store, they heard the truck's engine start, saw the lights come on and watched the truck proceed southbound (T. 38-40,55). Officer Sayes then followed the truck to a residence at "1500 something South Edison Street on 400 East" (T. 41), waited for the occupants to exit the vehicle, and then asked the two men for identification (T. 42). The vehicle's occupants were Mr. Deitman and Mr. Lozano. Officer Sayes ran a warrant check and found an outstanding warrant for Mr. Lozano. However, he did not arrest Mr. Lozano and both men were allowed to leave (T. 52).

Officer Sayes then returned to International Video and for the first time determined that indeed there had been a burglary (T. 43,52). A window had been broken and the owner of the store told the officers that a two-piece video recorder was missing (T. 15,52). Officer Sayes then returned to the residence where he had initially stopped Mr. Deitman and Mr. Lozano. Officer Sayes joined Officer Cracroft who had been watching the residence and had notified Officer Sayes that the two men had come back outside (T. 44). Officer Sayes

approached the house and as he passed the truck, which was parked at the house. He shined his flashlight into the back window, went around and checked the side window and then the cab window. "Basic officer safety" was officer Sayes' explanation for this viewing into the truck (T. 47). The officer testified he "saw a corner of something" while looking in the truck, but could not identify it (T. 48). However, another officer who had arrived at the scene also shined his flashlight into the back of the camper and saw more. Officer Bruce Smith, who was acquainted with Mr. Deitman, advised him that he should let the officers "look in his truck so we could get on our way and look for the real burglars" (T. 146). Mr. Deitman told the officers they could look, but could not get into the truck (T. 147). Officer Smith then observed "a rectangular type object, black in color and I could see what appeared to be a memory switch" (T. 148).

Mr. Lozano and Mr. Deitman were then placed under arrest (T. 46,57). The truck was seized and taken to the impound lot (T. 156). A search warrant was obtained the next day, March 2, 1984, and the truck was searched. A two-piece video recorder was found in the truck, matching the description of the one taken from International Video. However, the owner of the store, Mr. Shiotani, failed to give police the second serial number on the second piece of equipment and this was not in the information on the search warrant or the accompanying affidavit (T. 158,159).

Mr. Deitman and Mr. Lozano were charged with burglary,

a third degree felony, and theft, a second degree felony. Prior to trial, defense counsel submitted a Motion to SuppressEvidence Illegally Seized (T. 58-63) based on the fact that State's Exhibit Fifteen (15), the search warrant and affidavit, (Addendum C), authorized the seizure of one item, namely a two-piece video recorder with one serial number (R. 62). The actual evidence confiscated consisted of two distinct pieces of video equipment, each with its own serial number. This motion was denied, but counsel again argued for suppression of the evidence at trial, based on these facts and the fact that the officers involved did not have probable cause to effectuate the initial stop in the case (T. 164-169).

Mr. Deitman and Mr. Lozano were found guilty as charged after a bench trial and were then both sentenced to 0-5 years incarceration. The sentence was stayed and both Defendants were put on probation for 18 months and fined.

SUMMARY OF ARGUMENT

The Appellants content that evidence produced against them should have been suppressed as a result of an illegal investigative detention. Officers had no reason to stop Appellants because at the time of the stop, officers did not even know if a crime had been committed.

ARGUMENT

THE EVIDENCE USED TO CONVICT THE APPELLANTS AT TRIAL SHOULD HAVE BEEN SUPPRESSED AS THERE WAS NOT SUFFICIENT PROBABLE CAUSE TO EFFECTUATE A STOP.

The trial court in this case found the Defendants, Gerald W. Deitman and Albert Delphine Lozano, guilty of third degree burglary and second degree theft. At trial Defendants' counsel objected to the introduction of a two-piece video recorder (Exhibits No. 5 and 6), claiming the search warrant and affidavit for the warrant did not contain the same serial numbers as those found on the confiscated video recorder. In fact, the search warrant contained only one serial number rather than the two found on the video recorder. This was a renewal of Defendants' earlier pre-trial Motion to Suppress (T. 58-63). Defendants' counsel also argued at trial that the evidence was illegally obtained and should therefore have been suppressed because officers did not have sufficient probable cause to initially stop the Defendants (T. 5,164). Appellants now rely on that ground in bringing this appeal.

Utah Code Ann. §77-7-15 states that:

> "A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of

> committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions." (Emphasis added).

In determining what constitutes a "reasonable suspicion" the United States Supreme Court in Brown v. Texas, 443 U.S. 47,51 (1979) required such suspicion to be "based on objective facts, that the individual is involved in criminal activity." In that case, the Court found that an individual's presence in the alley of a neighborhood frequented by drug users was not sufficient in and of itself, without suspicion of any specific misconduct, to amount to an objective fact upon which a stop could be justified. The Court went on to say that when the stop is not based on objective criteria, "the risk of arbitrary and abusive police practices exceeds tolerable limits." Id. at 52.

In further defining the limits of objective criteria resulting in a "reasonable suspicion", this Court has ruled that a "mere hunch" will not give rise to the "constitutionally mandated 'reasonable suspicion'". State v. Swanigan, 699 P.2d 718, 719 (1985). Neither will this Court find "reasonablesuspicion" where "the stop was based merely on the fact that a car with out-of-state license plates was moving slowly through a neighborhood late at night." State v. Carpena, 27 Utah Adv. Rep. 29, 30 (1986).

The instant case is similar to Swanigan and Carpena. Officer Morgan Sayes testified at trial that in the early morning hours of March 1, 1984, approximately 2:30 or 3:00 a.m., he and Officer Schoney responded to a burglar alarm at 40

East 1300 South (T. 37,38). Upon arriving at the scene, International Video, the officers got out of their car and began walking toward the building from which the alarm came (T. 38). Before reaching the building, however, Officer Sayes saw a pickup truck with a camper parked on the opposite side of the street "about twenty-five yards down the street" (T. 39). The truck's lights came on, the engine was started, and the truck proceeded southbound down the street (T. 40).

Officer Sayes further testified that although few cars were parked on the street at that time, the pickup truck was not the only parked car (T. 50). The pickup truck was also parked approximately one-half block away from an all-night restaurant and near an apartment complex (T. 61-62). Officer Sayes admitted on cross-examination that in responding to the alarm, he did not know whether or not it was false (T. 53). The following exchange occurred:

> Q: (By Ms. Wells) Did you merely receive a call from your dispatcher that an alarm had gone off in the area?
>
> A. We received a burglary alarm at that address and basically we responded to that, not knowing whether it would be a good alarm or false alarm or whatever (T. 53).

In fact, Officers Sayes did not know whether the alarm was false or real until sometime later (T. 51).

In State v. Swanigan, 699 P.2d 718, 719 (1985), two individuals were stopped in an area "where recent burglaries had been reported" and where police knew a very recent burglary had been committed. The two people stopped had been noticed by

an officer shortly after the burglary had been reported. However, they were not stopped until spotted once again two hours later. The two were stopped based on the earlier general description given by the first officer to notice them. The Utah Supreme Court found that "neither officer had any knowledge that defendant and his companion had been at the scene of the crime" and that they "had not observed the men engaged in any unlawful or suspicious activity." Likewise, in the instant case, the officers did not observe the Defendants engage in any "unlawful or suspicious activity." Further, the officers had no knowledge that the Defendants had been at the scene of the crime, or even that a crime had initially been committed. In Swanigan, supra, the officers knew a burglary had been committed before they made a stop. In this case, the officer did not determine that any crime had been committed until after the Defendants had been initially stopped and the officer had returned to International Video.

After making a warrant check in Swanigan, officersarrested Mr. Swanigan and his companion based on an outstanding warrant. In this case, Officer Sayes also ran a warrant check and found an outstanding warrant on Mr. Lozano (T. 52). Nonetheless, the officer released the two Defendants after the initial stop and did not arrest them until after returning to International Video and ascertaining that a burglary had occurred. Equipped with only this additional information, Officer Sayes returned to the Defendants' residence, shined his flashlight into the pickup truck and saw

a "corner of something", not specifically identifiable as a video recorder (T. 47). Another officer also used his flashlight to look into the truck. He saw a black rectangular object and what looked like a memory switch (T. 148). Mr. Lozano and Mr. Deitman were then arrested (T. 49,60).

In State v. Carpena, 27 Utah Adv. Rep. 29, 30 (1986), the Defendants were in an area at 3:00 a.m. where a "rash of burglaries" had occurred, although no burglaries had been reported on the night in question. Officers involved "did not observe any criminal or traffic offense," but nevertheless followed the Defendants' car to a residence and effectuated a stop and search. This Court again found "the officer had no objective facts on which to base a reasonable suspicion that the men were involved in criminal activity."

In this case, Mr. Deitman and Mr. Lozano were stopped merely because they were parked across the street from a possible burglary and happened to start their pickup truck and drive away after the police arrived on the scene. The Appellants committed no traffic violations, nor were theyseen to commit any other criminal activity by the investigating officers. In fact, other cars were parked on the street at the time and the Appellants' truck was parked only a half a block away from an all-night restaurant, and very near to an apartment complex. Therefore, the officers possessed no objective criteria on which to base a "reasonable suspicion" that these two men were in any way involved in the possible burglary. The U.S. Supreme Court in Brown v.Texas, supra,

supported the need for police to base investigative stops on objective criteria "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id. at 51.

Aside from the illegal stop, Appellants were also harmed in that the search warrant obtained did not contain the two serial numbers found on the items confiscated. The search warrant had only one serial number, and this one contained a misplaced letter. Although this alone would probably not render the property "inherently unidentifiable as being stolen", State v. Gallegos, 23 Utah Adv. Rep. 23, 25 (1985), it nonetheless served to prejudice the Appellants' rights even further in a situation that should never have been instigated in the first place.

The Appellants respectfully request this Court to set aside their conviction because evidence was obtained only as a result of an initial illegal investigative stop and evidence flowing from that stop should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

Because the initial stop of Appellants was an illegal investigative detention, the evidence flowing from that stop should have been suppressed. Appellants now request this Court to reverse their convictions and remand the case for either a new trial or dismissal of the charges.

Respectfully submitted this 14th day of March, 1986.

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellants

CERTIFICATE OF SERVICE

I, BROOKE C. WELLS, herby certify that four copies of the foregoing Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84111, this 14th day of March, 1986.

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellants

DELIVERED by _____ this ____ day of March, 1986.

ADDENDUM A

76-6-202. Burglary.—(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

ADDENDUM B

76-6-412. Theft—Classification of offenses—Action for treble damages against receiver of stolen property.—(1) Theft of property and services as provided in this chapter shall be punishable as follows:

(a) As a felony of the second degree if:

(i) The value of the property or services exceeds $1,000; or

(ii) The property stolen is a firearm or an operable motor vehicle; or

(iii) The actor is armed with a deadly weapon at the time of the theft; or

(iv) The property is stolen from the person of another.

(b) As a felony of the third degree if:

(i) The value of the property or services is more than $250 but not more than $1,000; or

(ii) The actor has been twice before convicted of theft of property or services valued at $250 or less; or

(iii) When the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry.

(c) As a class A misdemeanor if the value of the property stolen was more than $100 but does not exceed $250.

ADDENDUM C

IN THE FIFTH CIRCUIT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. 0168

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah.

Proof by Affidavit under oath having been made this day before me by Bruce L. Smith - SLCPD, I am satisfied that there is probable cause to believe

That
( ) on the person(s) of _____
(x) in the vehicle(s) described as 1965 Ford Pick-Up, F-10, white in color, Utah License #LN5094
( ) on the premises known as _____

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now being possessed or concealed certain property or evidence described as:

A 2-piece RCA VCR Model VGP 170, serial #202510058

which property or evidence:

(x) was unlawfully acquired or is unlawfully possessed.
( ) has been used to commit or conceal a public offense.
( ) is being possessed with the purpose to use it as a means of committing or concealing a public offense.
(x) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.
( ) is evidence of illegal conduct in possession of a person or entity not a party to the illegal conduct and good cause being shown that the seizure cannot be obtained by subpoena without the evidence being concealed, destroyed, damaged, or altered. (Conditions for service of this warrant are included or attached hereto.)

You are therefore commanded:

(x) in the day time
( ) at any time day or night (good cause having been shown)
( ) to execute without notice of authority or purpose, (proof under oath being shown that the object of this search may be quickly destroyed or disposed of or that harm may result to any person if notice were given)

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SEARCH WARRANT

to make a search of the above-named or described person(s), vehicle(s), and premises for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the _____ Fifth Circuit Court, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this _____ day of March, 1984.

JUDGE, JUSTICE OF THE PEACE, OR
MAGISTRATE OF THE FIFTH CIRCUIT COURT

IN THE _____ COURT OF _____

SALT LAKE COUNTY, STATE OF UTAH

RETURN TO SEARCH WARRANT

NO. 01168

The personal property (listed below/set out on the inventory attached hereto) was taken from the premises located and described as _____

_____

and from the vehicle(s) described as 65 Ford PU FTO White Lic LN5094

and from the person(s) of N/A

_____

by virtue of a search warrant dated the 2 day of March, 1984, and executed by Judge

of the above-entitled court: _____

_____

I, Bruce Smith, by whom this warrant was executed, do swear that the (above/attached) inventory contains a true and detailed account of all the property taken by me under the warrant, on March 2, 1984.

All of the property taken by virtue of said warrant will be retained in my custody subject to the order of this court of or any other court in which the offense in respect to which the property or things taken, is triable.

Bruce Smith

Subscribed and sworn to before me this _____ day of _____, 19 ___.

JUDGE

#1 - RCA VHS VCR
Ser# 2025H0058

#2 RCA VHS TUNER
Ser# 152640148